



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 25, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0533

Dear Ms. Wiegman:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Texas Open Records Act. Your request was assigned ID# 112789.

The Texas Department of Health (the "department") received a request for "the complaint investigation of 8/8/97" for a particular hospital. There are two responsive complaint investigation reports. You assert that one of the investigation reports is excepted in its entirety pursuant to section 261.201 of the Family Code. You contend that the other complaint investigation report contains protected medical and mental health records, and also is protected from disclosure by common-law privacy under section 552.101 of the Government Code.

You assert that one of the reports is confidential in its entirety under section (a) of section 261.201 of the Family Code, which provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with . . . [the Family] code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under . . . chapter [261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under . . . chapter [261 of the Family Code] or in providing services as a result of an investigation.

The department has adopted rules concerning access to this type of information. Texas Administrative Code title 25, section 1.207 provides:

(a) The allegation and the reports, records, communications and working papers used or developed in the investigative process, including the resulting final report regarding abuse, neglect, or exploitation, are confidential and may be disclosed only as provided in the Family Code, § 261.201, or the Human Resources Code, § 48.101 and § 48.038(f) and (g), and pursuant to [this section]:

(b) Information discussed during deliberations of abuse, neglect, and exploitation investigations may not be discussed outside the purview of those deliberations.

(c) The completed investigative report and related documents may be released to governmental agencies as described in this [section].

(d) The completed investigative report and related documents may be released by court order.

(e) The completed investigative report and related documents may be released to the victim or the victim's parent or guardian if the victim is a minor if there is no ongoing criminal investigation. Any information which might reveal the identity of the reporter, any other patients or clients of the facility or any other person whose life or safety might be endangered by the disclosure must be blacked out or de-identified.

(f) The investigative report and related documents shall not be available to the public.

(g) The completed investigative report and related documents shall be released to the adoptive parents or prospective adoptive parents of a child who was the subject of an investigation or an adult who was the subject of an investigation as a child. Any information which might reveal the identity of the reporter, the biological parents or any other

person whose identity is confidential shall be blacked out or de-identified.

The complaint investigation report for which you assert section 261.201 protection appears to be a report used or developed in an investigation made under chapter 261 of the Family Code, and thus may be disclosed only for purposes consistent with the Family Code and applicable federal or state law or pursuant to the department's rule. As the department's rules do not provide for public release of the document, this report may not be released to the requestor.

You contend that portions of the other complaint investigation at issue are protected from disclosure by common-law privacy as protected under section 552.101 of the Government Code. Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 (1992) at 1. The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. In Open Records Decision No. 262 (1980), this office stated that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to drug overdoses, acute alcohol intoxication, gynecological or obstetrical illnesses, convulsions and seizures, or emotional and mental distress. *See also* Open Records Decision No. 539 (1990) at 5 (information concerning emotional state may be protected by common-law privacy). We agree that the investigation report must be de-identified as to the patient. We note that you have appropriately de-identified the investigation report by redacting the patient's name and the name of her husband.

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health

records only by certain individuals. *See* Open Records Decision No. 565 (1990). We agree that portions of the investigation file are protected from disclosure under section 611.002, and have marked those portions.

You also assert that portions of the investigation report are protected from disclosure by section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"). We note that the information that we have marked includes information protected under the MPA. None of the remaining information is protected from disclosure under the MPA. The de-identified report, with the marked information redacted, must be disclosed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 112789

Enclosures: Submitted documents

cc: Ms. Dicey Smith
Director of Nursing Services
BHC Millwood Hospital
1011 North Cooper Street
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(w/o enclosures)